

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

NU TEMP ASSOCIATES  
HEATING AND COOLING INC.<sup>1</sup>

Employer

and

Case 4–RC–20235

SHEET METAL WORKERS' INTERNATIONAL  
ASSOCIATION, LOCAL UNION NO. 19

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The Employer installs and services heating, ventilation and air conditioning (HVAC) systems. The Petitioner seeks to represent a unit of the Employer's full-time and

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<sup>1</sup> The Employer's name appears as amended at hearing.

regular part-time HVAC installers and helpers. The Employer takes the position that there is only one employee, Dan Vollmer, a helper, in the petitioned-for unit as a result of the layoff of a second helper, David Clemmer, and that the petition should be dismissed. Alternatively, the Employer contends that, if both Vollmer and Clemmer are included in the unit, then Kenneth Rosenthal, an installer who is the brother of one of the Employer's co-owners, should be included as well. The Petitioner contends that Clemmer has a reasonable expectation of reemployment and that application of the *Daniel/Steiny*<sup>2</sup> eligibility formula for construction industry employees to Clemmer provides another basis for his inclusion in the unit. The Petitioner further contends that Kenneth Rosenthal should be excluded from the unit because he is the relative of a co-owner and as such, has a special status with the Employer.

Tony Lanorgese and Larry Rosenthal each own a 50 percent interest in the Employer. Larry Rosenthal also works as an installer for the Employer, and Lanorgese performs estimating and service work. The Employer's office administrator is Margie Morris. Kenneth Rosenthal has worked as an installer for more than five years. Until recently, the Employer helps Dan Vollmer and David Clemmer. Clemmer was laid off recently, but Vollmer remains employed. The Employer has also recently employed another service employee, but he was discharged for failing to report to work. Last year, the Employer employed a helper named Jose Torres, but it never previously employed any helpers.<sup>3</sup>

About 90 to 95 per cent of the Employer's work is for residential customers, and the remainder is commercial work. Almost all of the Employer's installation work involves the replacement or retrofitting of existing HVAC systems, and the Employer also performs service and repair work. At times, the installations require the Employer to perform ductwork. The Employer's business generally increases during certain periods each year. Thus, from October through January, work on heating units increases. Work slows until April, when orders for the installation and servicing of air conditioning units begin to arrive. The air conditioning work begins to subside in July or August. Based on the cyclical nature of the work, the Employer routinely lays off Margie Morris and Kenneth Rosenthal, its only long-term employees, for about one or two months each year.

**David Clemmer:** Clemmer began working for the Employer on April 2, 2001.<sup>4</sup> The other helper, Vollmer, started on April 9. The parties stipulated that they both worked for at least thirty days prior to the June 25 hearing, but they did not always work 40 hour weeks. The Employer employs helpers only infrequently, but it decided to hire these two employees based on its expectation that its volume of its business would increase during late spring and early summer. Ultimately, the Employer did not experience the anticipated increase. On June 16, 2001, Larry Rosenthal laid off Clemmer because the Employer lacked work for him and explained that he could collect unemployment insurance benefits and seek other work. Morris testified that Clemmer would be recalled if work increased and the Employer needed to employ another helper. However, she further testified that the Employer has never recalled a laid off helper.

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<sup>2</sup> See *Steiny and Company, Inc.*, 308 NLRB 1323 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1981), modified at 167 NLRB 1078 (1967).

<sup>3</sup> The record does not indicate under what circumstances Torres ended his employment with the Employer.

<sup>4</sup> All dates are in 2001 unless otherwise indicated.

The record shows that the Employer is engaged in the construction industry. Thus, the Employer's work consists of the retrofitting, service and repair of HVAC units. The Board has found that retrofitting work is construction-type work. *Johnson Controls, Inc.*, 322 NLRB 669 (1996). The Board has also held that the service and repair of HVAC systems in existing structures constitutes construction work. *C.I.M. Mechanical Co.*, 275 NLRB 685, 691 (1985). See also *South Alabama Plumbing*, 333 NLRB No. 4, JD slip op. at 7 (2001); *Bay Area Sealers*, 251 NLRB 89 (1980); *Painters Local 1247 (Indio Paint and Rug Center)*, 156 NLRB 951 (1966). Accordingly, the *Daniel/Steiny* formula governs Clemmer's eligibility. As the parties stipulated that he worked at least 30 days for the Employer in the year 2001 prior to his layoff, he is eligible to vote in the election.<sup>5</sup>

**Kenneth Rosenthal:** As an installer, Rosenthal is paid an hourly wage of \$17.50, while helpers earn \$10 to 10.50 per hour. In contrast to the helpers, Rosenthal receives health, vacation and retirement benefits, uses a company vehicle for commuting, and possesses a company credit card for gasoline purchases. Unlike the helpers, Kenneth Rosenthal has keys to the Employer's building and is provided with shirts with the Employer's name on them. At times, he has participated with his brother Larry in conducting interviews with applicants for hire.

Section 2(3) of the Act specifically excludes from the protection of the Act "any individual employed by his parent or spouse." Where a relative of an owner does not fall squarely within the categories specifically excluded by the Act, the Board examines whether the relative enjoys special status or receives benefits or privileges not accorded other employees such that his or her interests are more closely aligned with management than with unit employees. *New Silver Palace Restaurant*, 334 NLRB No. 44, JD slip op. at 3 (June 18, 2001); *T.K. Harvin and Sons, Inc.*, 316 NLRB 510, 532-534 (1995). In *NLRB v. Action Automotive, Inc.*, 469 U. S. 490, 495 (1985), the Supreme Court affirmed the Board's practice of excluding from a bargaining unit close relatives of the owners of a closely held corporation, even in the absence of special job related benefits.

The record shows that Kenneth Rosenthal, whose brother is a half owner of the Employer, receives numerous benefits and privileges not enjoyed by the helpers. He receives health care insurance, retirement benefits, vacation and use of a company vehicle and gasoline credit card. He also receives far higher wages than the helpers. Unlike them, he has keys to the Employer's facility, and he has participated in applicant interviews with his brother. As a result of Kenneth Rosenthal's close relationship to a 50 percent owner of the company and the special

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<sup>5</sup> If the *Daniel-Steiny* formula did not apply, Clemmer would not be an eligible voter because at the time of his layoff, he did not have a reasonable expectation of reemployment with the Employer. The Board examines several factors in determining whether a laid off employee has a reasonable expectancy of recall, including the employer's past experience and future plans, the circumstances surrounding the layoff and what the employee was told about the likelihood of recall. *Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998), citing *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). Clemmer's layoff was prompted by the insufficient volume of work to justify the employment of two helpers, and there was no evidence that the Employer was likely to experience an upswing in business in the near future. Past experience demonstrates that a further decrease was likely. The Employer has never recalled a laid off helper, and, at the time of his layoff, Larry Rosenthal suggested that Clemmer should find a job elsewhere. While Kenneth Rosenthal and Margie Morris were recalled from layoffs in the past, the record does not provide a sufficient basis for assuming that Clemmer would have been similarly treated. See *Osram Sylvania*, supra, 325 NLRB at 760; *UXB International, Inc.*, 321 NLRB 446, 453 (1996). The fact that the Employer would recall Clemmer to work if work increased is speculative and does not establish an expectancy of recall in the near future. *Price's Pic-Pac Supermarket*, 256 NLRB 742, 743 (1981), enf'd. 707 F.2d 236 (6<sup>th</sup> Cir. 1983).

status and benefits that he enjoys, I find that his interests are more closely aligned with management than with the helpers, and that accordingly he should be excluded from the proposed bargaining unit. See *R & D Trucking, Inc.*, 327 NLRB 531, 533 (1999); *Luce and Son, Inc.*, 313 NLRB 1355 (1994); *Foster Electric, Inc.*, 308 NLRB 1253, 1263, fn. 21 (1992); *Midwestern Mining & Reclamation, Inc.*, 277 NLRB 221 (1985).

Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time installers and helpers employed by the Employer, excluding all other employees, office clericals, guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,<sup>6</sup> subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.<sup>7</sup> Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

### **SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 19**

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<sup>6</sup> Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

<sup>7</sup> *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

## LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **July 30, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, John Toner, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **August 6, 2001**.



Dated July 23, 2001

at Philadelphia, PA

/s/

**DANIEL E. HALEVY**

Acting Regional Director, Region Four

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